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No. 82-629

In the Supreme Court of the United States

OCTOBER TERM, 1982

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONERS

v.

WOLD ENGINEERING, P.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether, in the absence of an assumption of jurisdiction by the State under Public Law 280, over matters occurring on an Indian reservation, the Tribe occupying the reservation may bring an action in state court to recover damages from a non-Indian corporation for negligence and breach of contract in connection with the non-Indian corporation's design and construction of a water system on the reservation.

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This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners, the Three Affiliated Tribes of the Fort Berthold Reservation, are organized under a tribal constitution approved by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. The Tribal Code establishes a Fort Berthold Indian Court, which, at the time this suit arose, had the following jurisdiction over civil matters (ch. II, § 1(a); Pet. 13):[1]

[1] We have been informed by the Department of the Interior that on October 22, 1982, after the decision of the Supreme Court of North Dakota in this case, the Tribal Council amended the Tribal Code to give the Tribal Court jurisdiction over suits against non-Indians. We have been further informed that this amendment was approved by the Secretary of the Interior, as required by the Tribal Constitution.

Jurisdiction. The Fort Berthold Indian Court shall have jurisdiction of all suits wherein the defendant is a member of the Three Affiliated Tribes or an Indian over whom the Court has jurisdiction, and of all other suits between members and non-members brought before the Court by stipulation of the parties.[2]

Petitioners entered into a contract with respondent Wold Engineering for the design and construction of a water system for the Four Bears Village, located within the exterior boundaries of the Reservation. Wold is a professional corporation organized under the laws of North Dakota with offices located off the Reservation (Pet. 6-7). We have been informed by the Economic Development Administration of the United States Department of Commerce that the project was funded in substantial part by a public works project grant from EDA under Title I of the Public Works and Economic Development Act of 1965, 42 U.S.C. 3131.

After construction of the water system was completed, petitioners brought this action in the District

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[2] This jurisdictional provision is essentially identical to that contained in Interior Department regulations, first promulgated in 1935 (see 25 C.F.R. Part 161 (1949)) and modified in 1957 (22 Fed. Reg. 10515, 10518-10519), conferring civil jurisdiction on the Courts of Indian Offenses established by the regulations for a number of reservations. 25 C.F.R. 11.1(a) and 11.22. See *Williams* v. *Lee*, 358 U.S. 217, 222 (1959); cf. 25 U.S.C. 229 and 230. These regulations contain a section governing choice of law in such suits, requiring the application of any laws or regulations of the United States that govern the cause and any ordinances or customs of the tribe not inconsistent with federal law. 25 C.F.R. 11.23(a). Where federal or tribal law does not cover the particular matter, the Courts of Indian Offenses are to apply the law of the State in which the matter in dispute lies. 25 C.F.R. 11.23(c). The regulations also provide for the payment of the judgment out of the Indian defendant's individual funds held by the Secretary if the defendant himself does not satisfy the judgment. 25 C.F.R. 11.26. These regulations continue to apply to any tribe organized under the Indian Reorganization Act until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective. 25 C.F.R. 11.1(d).

Court for Ward County, North Dakota, claiming that respondent negligently designed the system (Pet. App. 4a-5a). The district court dismissed the complaint for lack of jurisdiction (Pet. App. 1a), and the Supreme Court of North Dakota affirmed (*id.* at 3a-10a).

ARGUMENT

The Supreme Court of North Dakota has closed the courts of that State to suits by Indians against non-Indians concerning matters arising on Indian reservations, even though such suits are not barred by any federal statute and do not impermissibly infringe upon the federally protected sovereignty of the tribes. This decision is at odds with the consistent view of this Court, both before and after the enactment of Public Law 280,[2] that Indians may sue non-Indians in state court. The decision also seriously misapprehends the purpose of Public Law 280, which was to facilitate the assumption by the States of new jurisdiction over matters arising on Indian reservations, not to impose obstacles to the exercise by the States of jurisdiction that already was permissible under federal law, such as the adjudication of suits brought by Indians against non-Indians. The Court accordingly should grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of North Dakota.

1.a. This Court repeatedly has made clear that Indians may sue non-Indians in state courts and that such suits are fully consistent with accepted principles governing the exercise by the States of jurisdiction over matters arising on Indian Reservations. In *Felix* v. *Patrick*, 145 U.S. 317 (1892), the Court observed with respect to the Indian plaintiffs: "It is scarcely necessary to say in this connection that, while until [they accepted allotments under the applicable treaty] they were not citizens of the United States, capable of suing as such in the Federal courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color." 145

[2] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

U.S. at 332.[4] Three decades later, in *United States* v. *Candelaria*, 271 U.S. 432, 444 (1926), the Court held that a New Mexico state court had jurisdiction to entertain a suit brought by the Indian Pueblo of Laguna against non-Indians to quiet title in the Pueblo to land that was subject to restrictions on alienation under the Trade and Intercourse Act.[5] This despite the fact, not adverted to by the Court, that the Enabling Act for the admission of New Mexico to the Union required the state constitution to provide that absolute jurisdiction and control of Indian lands, including that of the Pueblo Indians, was to be in the Congress of the United States. Act of June 20, 1910, ch. 310, Section 2, 36 Stat. 558. See *United States* v. *Sandoval*, 231 U.S. 28, 36-38 (1913).

The Court reiterated this rule in *Williams* v. *Lee*, 358 U.S. 217 (1959). There the Court held that state courts did not have jurisdiction over a suit by a non-Indian owner of a store on the Navajo Indian Reservation in Arizona against two Navajo Indians to collect for goods sold to them on credit; the suit instead had to be brought in the tribal court, which had been granted jurisdiction over suits by outsiders against Indian defendants. 358 U.S. at 222. Yet even while so ruling, the Court reaffirmed the principle that Indians may sue outsiders in state court (*id.* at 219-220, citing *Felix* v. *Patrick* and *United States* v. *Candelaria*), and it did so while acknowledging that the State of Arizona, where the case arose, is subject to an express disclaimer of jurisdiction over Indian lands in its Enabling Act and state constitution (358 U.S. at 223 n.10).

The Court observed in *Williams* v. *Lee* that the "broad principles" of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515

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[4] Citing *Blue-Jacket* v. *Commissioners of Johnson County*, 3 Kan. 299 (1865), rev'd on other grounds *sub nom. The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *Swartzel* v. *Rogers*, 3 Kan. 374 (1865); *Wiley* v. *Keokuk*, 6 Kan. 94 (1870).

[5] Rev. Stat. 2116 (1878 ed.), Trade and Intercourse Act of 1834, ch. 161, Section 12, 4 Stat. 730, as extended to New Mexico by the Act of Feb. 27, 1851, ch. 14, Section 7, 9 Stat. 587.

(1832)—which the Court characterized as an instance in which the State of Georgia "sought to impose [its] laws and courts on the Indians" (358 U.S. at 218)—have come to be accepted as law (*id.* at 219). But the Court explained that within these broad principles, state jurisdiction has been recognized "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized"; "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*id.* at 219, 220). Suits by Indians against non-Indians in state courts were cited as an example of the exercise of state jurisdiction that did not infringe on that right. *Id.* at 219. Moreover, by citing for this proposition not only *Felix* v. *Patrick*, but also *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948)—which held that Indians have a right to vote in Arizona—the Court in *Williams* v. *Lee* again viewed the right of access to state courts as a basic right that Indians share in common with all other persons in the State.

The Court reaffirmed these principles once again in *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973). The Court there held that the State of Arizona could not tax the reservation income of an Indian residing on the Navajo Reservation. But the Court nevertheless twice reiterated that suits by Indians against outsiders in state court are consistent with the principles announced in *Williams* v. *Lee* governing the accommodation of federal, state, and tribal jurisdiction on an Indian reservation (411 U.S. at 171, 173), even while acknowledging the disclaimer of jurisdiction over Indian lands contained in the Enabling Act for Arizona and other States (*id.* at 175-176 & n.14). Indeed, *McClanahan* itself was a suit filed by an Indian in state court in a disclaimer State concerning matters arising on the Reservation, and the propriety of the exercise of jurisdiction by the state courts was never questioned, even though the tax at issue was struck down. See also *Ramah Navajo*

School Board, Inc. v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982).

Moreover, the Court in *McClanahan* once again viewed the right of access to state courts as a right that Indians share along with other citizens of the State, just like the right of Indians to vote[6] and to receive some state services. 411 U.S. at 172-173. See also *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 370-371 (1968), quoting *Brown* v. *Anderson*, 61 Okla. 136, 138-139, 160 P. 724, 726 (1916); *Bonnet* v. *Seekins*, 126 Mont. 24, 243 P.2d 317 (1952). The supreme courts of other States likewise have recognized the right of Indians, like other citizens, to have access to state courts to bring suits against non-Indians concerning matters arising on the reservation. *Whiting* v. *Hoffine*, 294 N.W.2d 921, 923-924 (S.D. 1980); *McCrea* v. *Busch*, 164 Mont. 442, 524 P.2d 781 (1974); *Paiz* v. *Hughes*, 76 N.M. 562, 417 P.2d 51 (1966); *Red Hawk* v. *Joines*, 129 Or. 620, 278 P. 572 (1929). See also *Johnson* v. *Kerr-McGee Oil Industries, Inc.*, 129 Ariz. 393, 395, 631 P.2d 548, 550 (Ct. App.), cert. denied, 454 U.S. 1025 (1981); F. Cohen, *Handbook of Federal Indian Law* 351, 355 (1982).[7]

b. This Court's cases therefore establish that, absent an Act of Congress so providing, reservation Indians may not be sued in state court for matters arising on the reservation, because to do so would interfere with the right of tribal self-government[8]—especially where, as in *Wil-*

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[6] Once again citing *Harrison* v. *Laveen*, *supra*. See 411 U.S. at 173 & n.10.

[7] The legal principles announced in *Williams* v. *Lee* regarding jurisdiction over suits between Indians and non-Indians also were reiterated in *Fisher* v. *District Court*, 424 U.S. 382, 386 (1976), and *Kennerly* v. *District Court*, 400 U.S. 423, 426-427 (1971).

[8] The test under *Williams* v. *Lee* and related cases for determining whether the exercise of jurisdiction by state courts over causes of action arising on an Indian reservation is lawful—*i.e.*, whether there is governing federal legislation and, if not, whether the state action would infringe on the right of reservation Indians to make their own laws and to be ruled by them—is simply one

liams v. *Lee*, the tribal court has jurisdiction over such disputes. See also *Fisher* v. *District Court*, 424 U.S. 382, 383, 386-389 (1976); *Kennerly* v. *District Court*, 400 U.S. 423, 425 (1971). The state courts may not "impose their * * * courts on the Indians" in this fashion (*Williams* v. *Lee*, *supra*, 358 U.S. at 218), which might "jeopardize[]" the rights of Indians by permitting them to be haled into often hostile state courts (*id.* at 219). This policy of deference to the mechanisms adopted by the tribes—or by the Secretary on their behalf (25 C.F.R. 11.22)—for the redress of grievances against tribal members is of long standing, as reflected in Sections 17 and 18 of the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 731 and 732, now codified at 25 U.S.C. 229 and 230.

But at the same time, as we have explained, this Court's cases also consistently have recognized the right of an Indian to sue a non-Indian in state court. This implements the principles of *Williams* v. *Lee*. When an Indian voluntarily invokes the jurisdiction of the state court, the State does not "impose" its courts on the Indians. Although it is true that the state court might be as hostile to the Indian's position when he is the plaintiff as when he is the defendant, the Indian plaintiff may be said to have voluntarily accepted that risk by submitting his cause to the state court. And at least where, as in this case when the suit was filed, the tribe has not exercised its inherent sovereign powers by conferring jurisdiction on its tribal courts over suits by Indians against non-Indians with regard to contract disputes or similar reservation matters affecting the tribe or its members (see *Santa Clara Pueblo* v. *Martinez*, 436 U.S.

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means of describing what this Court has recognized in other cases as two " 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be preempted by federal law, or it may interfere with the Tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, *supra*, slip op. 4-5, quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980).

49, 65 (1978); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982)), the exercise of jurisdiction by the state courts does not impermissibly interfere with tribal sovereignty or self-government.[9] This is especially so, as in the instant case, when it is the tribe itself that has brought the action in state court. In such a case, the tribe may be held to have determined for itself that submitting the matter to state court is consistent with tribal interests. Moreover, unlike the case of claims *against* Indians, for which an Act of Congress and Interior Department regulations embody a policy of deference to tribal mechanisms for their resolution (see page 7 & note 2, *supra*), there are no federal statutes or regulations that reflect a comparable policy that could be said to preclude suits by Indians against non-Indians in state court.

Finally, where the tribal court does not have jurisdiction of the matter, the effect of a holding that the state courts likewise do not have jurisdiction would be to de-

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[9] There accordingly is no occasion to consider at this time whether a state court would have jurisdiction over a suit by an Indian against a non-Indian if the tribe had conferred jurisdiction on its tribal court over suits by tribal members against non-Indians concerning matters arising on the reservation. In such a case, in determining whether tribal sovereignty would be impermissibly infringed by the exercise of state jurisdiction, it would be relevant whether the tribal court was vested with exclusive jurisdiction over the subject matter in furtherance of an important tribal interest, or whether the tribe had simply conferred concurrent jurisdiction on the tribal court in the interest of providing an alternative forum for the determination of such disputes. *Cf. Kennerly* v. *District Court*, *supra*, 400 U.S. at 425-426. Compare *Fisher* v. *District Court*, *supra*, 424 U.S. at 384 n.5, 389; see also *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59-60, 65. In *Kennerly*, the governing statutes regarding the assumption by a State of civil jurisdiction—Public Law 280 and Title IV of the Civil Rights Act of 1968—did not permit the suit against Indians in state court there at issue (400 U.S. at 427-429), irrespective of whether such a suit would impermissibly infringe upon tribal self-government in light of the tribal ordinance recognizing concurrent jurisdiction in the tribal and state courts over suits against Indians (*id.* at 425).

prive the Indian plaintiff of any forum for resolution of the matter, unless the contract or other dispute could be said to arise under federal law for purposes of federal question jurisdiction under 28 U.S.C. (Supp. V) 1331 [10] or unless the requirements of federal diversity jurisdiction were satisfied. By contrast, in *Fisher* v. *District Court*, *Kennerly* v. *District Court*, and *Williams* v. *Lee*, the result of the decision barring state jurisdiction was not to deny a forum for the lawsuit, because the tribal court did have jurisdiction over the case.

2.a. The Supreme Court of North Dakota did not address the decisions of this Court and of other state courts

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[10] We have been informed that petitioners have adopted a tribal code establishing substantive rules to govern contractual relations on the Reservation. This tribal law might well govern the instant case in state court. A suit brought to enforce rights conferred by tribal law would not appear to be one arising under federal law for purposes of the jurisdiction of federal district courts under 28 U.S.C. (Supp. V) 1331. See *Gila River Indian Community* v. *Henningson*, 626 F.2d 708, 714-715 (9th Cir. 1980), cert. denied, 451 U.S. 911 (1981); see also *Mescalero Apache Tribe* v. *Martinez*, 519 F.2d 479 (10th Cir. 1975). Cf. *United States* v. *Wheeler*, 435 U.S. 313 (1978); but cf. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 682 n.16 (1974). There is, however, no reason why state courts may not apply tribal substantive law in suits within their jurisdiction. See, *e.g.*, *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899); *United States ex rel. Mackey* v. *Coxe*, 59 U.S. (18 How.) 100 (1855). Cf. 25 U.S.C. 1322(c); *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 66 n.21, citing *United States ex rel. Mackey* v. *Coxe*, *supra*.

It also is not clear to what extent, if any, the instant suit would be governed by federal law, by virtue of the participation by the Economic Development Administration in the project. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726-727 (1979); cf. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979). Of course, even if federal law applied because of substantial federal involvement in the Indian transaction at issue, the applicable federal rule of decision might in appropraite circumstances be adopted from tribal or state law. *United States* v. *Kimbell Foods, Inc.*, *supra*, 440 U.S. at 727-740; *Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 671-676. Cf. 25 C.F.R. 11.23(a) and (c); note 2, *supra*.

that have recognized that the right to bring suit in state court is one that Indians residing on a reservation in a State share with non-Indian residents of the State and that such suits by Indians do not impermissibly infringe upon tribal sovereignty—at least where the suit is not against another tribal member or where the tribe concerned has not asserted exclusive jurisdiction over the matter. Indeed, the State Supreme Court acknowledged that it previously had held that the courts of North Dakota retained residuary jurisdiction over suits brought by Indians concerning certain matters arising on Indian reservations, notwithstanding the disclaimers in its Enabling Act and its State Constitution adopted in 1889 (Pet. App. 6a, citing *Vermillion* v. *Spotted Elk*, 85 N.W.2d 432 (N.D. 1957)).[11] In *Vermillion*, the court relied on Article I, Section 22 of the North Dakota Constitution, which provides that the courts of the State shall be open to "every man" (85 N.W.2d at 438), and it acknowledged the general rule in other States that Indians, as citizens, have a right to sue in state court (*id.* at 436).

The Supreme Court of North Dakota concluded, however, that a different result was required in the instant case by virtue of Section 203 of the North Dakota Constitution, which was adopted in 1958, after *Vermillion*

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[11] In *Vermillion*, the Supreme Court of North Dakota held that it had jurisdiction over a suit by one Indian against another for damages arising out of an automobile accident on the Standing Rock Indian Reservation. The particular holding in *Vermillion* could not survive this Court's subsequent decisions in *Williams* v. *Lee*, *Kennerly* v. *District Court*, and *Fisher* v. *District Court*, because the resolution of disputes between tribal members that arise on the reservation is at the core of the right of tribal self-government with which a State may not interfere. However, the rule that suits in state courts between Indians concerning matters arising on the reservation are barred because they infringe upon federally protected tribal sovereignty does not undermine the force of the reasoning in *Vermillion* that state courts must remain open to suits by Indians where the exercise of state jurisdiction would *not* interfere with the overriding federal policy of preserving tribal sovereignty or with a federal statute barring such jurisdiction.

was decided. This constitutional provision was, according to the court, adopted "[u]nder the authority of Public Law 280" (Pet. App. 6a). Section 203 of the North Dakota Constitution reiterates the standard disclaimer, required by Section 4 of the Enabling Act of Feb. 22, 1889 (ch. 180, 25 Stat. 676)[12] and contained in the original North Dakota Constitution, that " 'Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States' " (Pet. App. 6a). Section 203 adds a new provision, however, that permits the state legislature, " 'upon such terms and conditions as it shall adopt, [to] provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress' " (*id.* at 6a-7a). After Section 203 of the State Constitution was adopted, the state legislature then enacted Chapter 27-19 (Civil Procedure) of the North Dakota Century Code Annotated (Repl. 1978) (printed at Br. in Opp. 19-22). Section 27-19-01 of that Code states that "[i]n accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter."

The North Dakota Supreme Court concluded in this case that Section 203 of the State Constitution amounts to a "complete disclaimer" of jurisdiction over *all* civil causes of action arising on an Indian reservation, except upon acceptance by the Indians of the reservation in the manner provided by the state statute (Pet. App. 7a, quoting *In re Whiteshield*, 124 N.W. 2d 694 (N.D. 1963)). Accordingly, the court held (Pet. App. 7a) that any ju-

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[12] The 1889 Enabling Act provided for the admission of the States of North Dakota, South Dakota, Washington, and Montana. See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 479-481 & n.23 (1979).

risdiction over civil causes of action that previously had existed in the North Dakota courts had been withdrawn.[13]

The court's decision that, under the authority of Public Law 280, the 1958 disclaimer in the State Constitution effects a complete disclaimer of even that jurisdiction over suits concerning matters arising on Indian reservations that state courts could exercise prior to the enactment of Public Law 280 and adoption of the corresponding state constitutional provision is based on a misreading of Public Law 280.[14] There is no indication that in enacting

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[13] The court explained that following the adoption of Section 203 of the State Constitution, it had overruled *Vermillion* v. *Spotted Elk* in *In re Whiteshield*. The latter case involved an action in state court for the termination of parental rights where all the parties were Indians—a suit, like *Vermillion* itself, over which state court jurisdiction was barred by federal law because such jurisdiction would interfere with tribal sovereignty. Cf. *Fisher* v. *District Court, supra*. Two other of the prior decisions of the North Dakota Supreme Court cited in the decision below as precedent for its holding that state courts did not have jurisdiction here (Pet. App. 7a) involved suits by non-Indians against Indians that likewise would be barred by federal law, under the rationale of *Williams* v. *Lee* and *Kennerly* v. *District Court*. See *Nelson* v. *Dubois*, 232 N.W. 2d 54 (N.D. 1975), and *Gourneau* v. *Smith*, 207 N.W. 2d 256 (N.D. 1973). It apparently was not until 1981 that the North Dakota Supreme Court had occasion to consider whether an Indian could sue a non-Indian in state court with respect to a matter arising on the reservation. See *United States ex rel. Hall* v. *Hansen*, 303 N.W. 2d 349 (N.D. 1981), in which the court held that such a suit could not be brought. Even then, the issue arose in the context of whether the trial court could consider the counterclaim filed by the non-Indian defendant against the Indian plaintiff after the Indian plaintiff withdrew his complaint. *Id.* at 350.

[14] The court's holding also is difficult to reconcile with the text of the state constitutional and statutory provisions involved. Section 203 of the State Constitution speaks of the "acceptance" of jurisdiction that may be "delegated" by Congress. This language suggests an intent to establish a procedure for the receipt of *new* jurisdiction conferred by Congress, not to disclaim preexisting jurisdiction. Similarly, the statute implementing Section 203 provides that, in accordance with Public Law 280, state jurisdiction shall be "extended" to all civil causes of action arising on Indian reservations upon the consent of the Indians; there is no suggestion of a withdrawal of other jurisdiction.

Public Law 280, Congress intended to oust state courts of any jurisdiction—such as that over suits by Indians against non-Indians—which theretofore was not barred by federal law. Nor is there any indication that Congress intended Public Law 280 to be an affirmative authorization for the States, in their discretion, to close their courts to suits by the Indian citizens and tribes of the State where such suits are not independently barred by federal statute, treaty, or regulation or would not impermissibly infringe upon the federally protected sovereignty of the tribe. To the contrary, as we explain below, the entire thrust of Public Law 280 was to facilitate the assumption of *new* jurisdiction by the States.

b. The text of Public Law 280 does not support the decision of the North Dakota Supreme Court. Section 4 of the Act (Act of Aug. 15, 1953, ch. 505, 67 Stat. 589, 28 U.S.C. (& Supp. V) 1360), provides that each of five named States [15] would immediately have civil jurisdiction "over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action * * *." Section 4 was not concerned with the contours of State jurisdiction over civil causes of action involving Indians in the specified areas of Indian country prior to the enactment of Public Law 280, because after its enactment the States were to have jurisdiction over all such suits. Obviously, Section 4 did not oust these five States of any jurisdiction over the specified areas of Indian country or constitute an affirmative authorization to the five States to disclaim jurisdiction over the very areas of Indian country to which Congress had intended them to have complete civil jurisdiction immediately upon enactment of the statute.[16]

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[15] California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska has since been added to the list.

[16] Subsection (b) of Section 4, 28 U.S.C. 1360(b), contains certain limitations on the exercise of state civil jurisdiction, but those limitations are not at issue here.

North Dakota was not one of the five States for which an immediate vesting of all civil jurisdiction was accomplished by Section 4 of Public Law 280. Instead, because of the disclaimer clause in its Enabling Act and State Constitution, North Dakota was governed by Section 6 of Public Law 280 (67 Stat. 590),[17] which provides:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Nothing in this Section suggests a congressional intent to oust the States of jurisdiction they theretofore had been exercising or to authorize the States to disclaim any such jurisdiction. Section 6 speaks instead of the "assumption" of jurisdiction—which connotes a transfer of *new* jurisdiction from the federal government to the States—and the removal of impediments to that assumption contained in the Enabling Act or state constitution. The purpose of Section 6 was to provide a mechanism whereby States such as North Dakota could place themselves on an equal footing with the five States that acquired jurisdiction automatically under Section 4 of the Act, which, as we have explained, clearly did not permit the affected States to disclaim jurisdiction.

In addition, as we also have explained (see pages 4-5, *supra*), the disclaimer clauses in the Enabling Acts and state constitutions of North Dakota and other states were not impediments to the exercise of jurisdiction by state

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[17] See *Washington* v. *Yakima Indian Nation*, *supra*, 439 U.S. at 474.

courts over civil suits brought by an Indian against a non-Indian with respect to matters arising on the reservation. The authorization in Section 6 of Public Law 280 for States to remove the disclaimer clause impediments to jurisdiction therefore was not necessary for these States to continue to exercise jurisdiction over such suits. As a result, Section 6 of Public Law 280 has no bearing on the issue in this case. At the very least, that Section cannot be read in the manner adopted by the Supreme Court of North Dakota to authorize the States to adopt *broader* disclaimer provisions than previously were in effect in order to bar jurisdiction over suits by Indians against non-Indians that state courts previously could entertain.

The foregoing interpretation of Section 6 is reinforced by Section 7 of Public Law 280 (67 Stat. 590), which provided that as to the other "option" States, for which there is not a disclaimer in the Enabling Act or state constitution (*ibid.*; emphasis added):

> The consent of the United States is hereby given to any other State *not having jurisdiction* with respect to * * * civil causes of action * * * as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State, shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Once again, this provision addressed only those situations in which the States did not already have jurisdiction. Section 7 of Public Law 280 was repealed by Section 403(b) of the Civil Rights Act of 1968, Title IV, Pub. L. No. 90-284, 82 Stat. 79, 25 U.S.C. 1323(b). However, 25 U.S.C. 1322(a), enacted as Section 402(a) of the Civil Rights Act of 1968 (82 Stat. 79), which governs the assumption of jurisdiction by all States—including North Dakota—that had not acquired jurisdiction over Public Law 280 prior to 1968, is written in similar terms that grant the consent of the United States to any State "not having jurisdiction" over civil causes of action to assume such jurisdiction. There is no expression of an intent to disturb state jurisdiction that already was permissible

under federal law without regard to Public Law 280 or the 1968 amendments to that law.

c. Nor does the legislative history of Public Law 280 support the interpretation given it by the North Dakota Supreme Court. That history repeatedly refers to the Act as providing for an "extension" or "transfer" of civil jurisdiction or to "confer" jurisdiction on the States, thereby confirming the legislative purpose to facilitate an assumption of new jurisdiction by the States. See, *e.g.*, H.R. Rep. No. 848, 83d Cong., 1st Sess. 6, 7 (1953);[18] S Rep. No. 699, 83d Cong., 1st Sess. 5-7 (1953); *Hearing on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 13, 17, 18, 22 (June 29, 1953) (unpublished, but lodged with the Clerk of this Court); *id.* at 1, 11 (July 15, 1953).[19] This Court's decisions likewise describe Public Law 280 as designed to accomplish a transfer of jurisdiction to and assumption of jurisdiction by the States. See, *e.g.*, *Williams* v. *Lee*, *supra*, 358 U.S. at 222-223; *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 687 n.3 (1965); *Kennerly* v. *District Court*, *supra*, 400 U.S. at 427, 428, 429;[20] *McClanahan* v. *Ari-*

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[18] The House Report also refers (*id.* at 5, 7) to civil jurisdiction "over Indians," which suggests in personam jurisdiction over Indians as *defendants*.

[19] This same view is reflected in the legislative history of the 1968 Civil Rights Act that amended Public Law 280. See, *e.g.*, S. Rep. No. 90-721, 90th Cong., 1st Sess. 32 (1968) (additional views of Senator Ervin); *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 25 (1968) (referring to tribal consent requirement to assumption of jurisdiction to ensure that Indians are not "subjected" to state courts before they are ready); *id.* at 27, 32, 38, 91 (discussing *Paiz* v. *Hughes*, *supra*, in which an Indian sued a non-Indian), 104, 108-109, 115-116, 120-121, 133; 114 Cong. Rec. 9560, 9596, 9615 (1968); *id.* at 5520 (Presidential message).

[20] In *Kennerly*, the Court observed that at the time the case arose, "[w]ith regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country," there was a governing Act of Congress,

zona State Tax Commission, *supra*, 411 U.S. at 177-178; *Fisher* v. *District Court*, *supra*, 424 U.S. at 388, 389; *Bryan* v. *Itasca County*, 426 U.S. 373, 381, 385, 386 (1976); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 475, 483, 484, 485, 486 & n.29, 490, 491, 492 n.36, 493, 495, 497, 499 (1979).

It would be inconsistent with the purpose of Public Law 280 of facilitating the exercise by the States of jurisdiction over all civil causes of action arising on Indian reservations [21] to interpret that law to impose a new federal impediment to the exercise of jurisdiction over suits such as that involved here. Indeed, in *Williams* v. *Lee* and *McClanahan* v. *Arizona State Tax Commission*, in which Public Law 280 was specifically discussed, the Court reiterated the long-established rule, drawn from *Felix* v. *Patrick* and *United States* v. *Candelaria*, that Indians may sue non-Indians in state court, without any suggestion that the enactment of Public Law 280 had withdrawn that jurisdiction from the States or authorized the States to disclaim it.[22]

Public Law 280. 400 U.S. at 427, quoted in *Bryan* v. *Itasca County*, 426 U.S. 373, 386 (1976). *Kennerly*, however, involved a suit against an Indian by a non-Indian. The reference to suits brought *by* Indians therefore was dictum, even assuming that it was made with reference to the type of suit involved here. There was, moreover, no reference in *Kennerly* to the prior cases sustaining state jurisdiction over suits brought by Indians against non-Indians. In addition, it would be inconsistent with the Court's use of the phrase "extension of state jurisdiction" to read the passage in the Court's opinion as a suggestion that Congress at the same time withdrew jurisdiction over certain causes of action until the new procedural requirements of Public Law 280 were satisfied.

[21] See *Washington* v. *Yakima Indian Nation*, *supra*, 439 U.S. at 490-491.

[22] When Congress enacted 28 U.S.C. 1362 in 1966 to give federal courts jurisdiction over suits by recognized tribes arising under federal law without regard to the amount in controversy, the assumption was that such suits otherwise would be brought in state court, if at all. S. Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966); H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2-3 (1966); 112 Cong. Rec. 20769 (1966). It is instructive that the suit that was cited in

Finally, even if the civil jurisdiction provisions of Public Law 280 were thought to be ambiguous with regard to their effect on suits by Indians against non-Indians, this Court has made clear that the construction of Public Law 280 is to be "guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976), that 'statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918)." *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392. Without a clear expression of congressional intent, Public Law 280 cannot, consistent with this principle of statutory construction, be interpreted to abrogate the preexisting and uniformly recognized right, possessed by Indians along with non-Indians, to sue in state court. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 382.

3. Although the North Dakota Supreme Court's decision in the instant case purported to be based on the disclaimer clause in Section 203 of the State Constitution and the state statute passed pursuant to Section 203, it is clear that the court's construction of the State Constitution and statute ultimately rested on the court's interpretation of Public Law 280 as either authorizing or requiring the State to disclaim jurisdiction over suits such as that involved here. See also *Poitra* v. *Demarrias*, 502 F.2d 23, 27 (8th Cir. 1974), cert. denied, 421 U.S. 934 (1975). The court observed, for example, that Section 203 of the State Constitution was adopted "[u]nder the authority of Public Law 280" (Pet. App. 6a), and Section 27-19-01 provides for the assumption of jurisdiction "[i]n accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution" (Br. in Opp. 19).

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the legislative history as an example of the type of suit for which the statute was designed, *Yoder* v. *Assiniboine & Sioux Tribe*, 339 F.2d 360 (9th Cir. 1964), arose in Montana, a disclaimer state, after the enactment of Public Law 280.

Moreover, Section 203 itself refers to the acceptance of jurisdiction "as may be delegated to the state by Act of Congress"—a reference to Public Law 280 and like statutes. State jurisdiction over suits by Indians against non-Indians was not "delegated" by Congress in Public Law 280; it was an aspect of state jurisdiction that never was barred or displaced by the disclaimer clauses in the Enabling Acts. Accordingly, it seems likely that the North Dakota Supreme Court would not construe Section 203 of the State Constitution and the state statute implementing that Section to bar jurisdiction in the instant case if this Court were to hold, as we submit, that Public Law 280 is not a bar to such suits.

Indeed, a contrary construction of the State Constitution and statute would raise a substantial question under the Equal Protection Clause of the Fourteenth Amendment to the Constitution. See also 42 U.S.C. 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory * * * to sue * * * as is enjoyed by white citizens * * *"). The result of such a holding would be that a State may deprive Indians of the fundamental right of access to state courts [23] without any authorization given by the federal government in furtherance of an overriding federal policy regarding Indian affairs that might make an ouster of state jurisdiction appropriate. Compare *Plyler* v. *Doe*, No. 80-1538 (June 15, 1982), slip op. 21-23. In *Washington* v. *Yakima Indian Nation*, *supra*, the Court reaffirmed that the unique legal status of Indian tribes under federal law permits the federal government to enact legislation singling out Indian tribes, even though that legislation might otherwise be constitutionally offensive. 439 U.S. at 500-501, citing *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). The Court stressed, however, that "States do not enjoy this same unique relationship with Indians" (439 U.S. at 501). The Court nevertheless sus-

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[23] See, *e.g.*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972).

tained the state jurisdictional statute there at issue because the Court found that it was enacted in response to Public Law 280 and was within the scope of the authorization granted by that law. 439 U.S. at 501. In this case, by contrast, Public Law 280 did not purport to authorize the State of North Dakota to disclaim any preexisting jurisdiction over suits by Indians against non-Indians.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Supreme Court of North Dakota should be reversed insofar as it rests on that court's interpretation of Public Law 280 as requiring or authorizing a disclaimer by the State of jurisdiction over this suit, and the case should be remanded for further proceedings regarding the interpretation of the State Constitution and statute, consistent with the views expressed herein.

Respectfully submitted.

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